

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP1170
2015AP1821**

Cir. Ct. No. 2014FA364

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

KEVIN C. BURNEY,

PETITIONER-RESPONDENT,

V.

JODIANN L. STEINER , F/K/A JODIANN L. BURNEY,

RESPONDENT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ and PAUL BUGENHAGEN, JR., Judges. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. In these consolidated cases, Jodiann Steiner, f/k/a Jodiann Burney, appeals the property division portion of the amended judgment granting a divorce to her and her former husband, Kevin Burney, and the order denying her motion for reconsideration or to reopen the judgment.¹ We affirm.

¶2 Jodiann and Kevin married in 2008. So their children from their prior marriages would not have to change schools, Jodiann and Kevin maintained separate households, hours apart, until December 2013. Kevin moved out in February 2014 and filed for divorce on March 17. A judgment of divorce was granted on December 4, 2014.

¶3 Jodiann earns about \$33,000 a year; Kevin earns a base salary of \$130,000 plus commissions and in some years is granted stock options. Kevin's commission income (the "Lear" and "ADM" commissions) received during the pendency of the divorce action is at issue here. The gross Lear commission was \$270,000. Kevin received half, about \$96,000 net, in 2013 and half in February 2014.² The Lear project later was canceled, potentially subjecting the commission to "claw back," or repayment to his employer, Tradeshift Holdings, Inc. An option was to adjust the ADM commission, the gross of which was \$165,761. Kevin received half of the ADM commission, about \$54,000 net, in November 2014, six days before trial, and half in December 2014 after the divorce was final. He did not disclose the ADM commission to Jodiann or the court before or at trial.

¹ The Honorable Ralph M. Ramirez presided over the trial and postjudgment hearings. The Honorable Paul Bugenhagen, Jr., entered the order denying the plaintiff's postjudgment motions based on Judge Ramirez's oral findings and ruling.

² As the 2013 half of the Lear commission is not at issue, by "Lear commission" we mean the February 2014 portion.

¶4 Also at issue are two grants of Tradeshift stock options Kevin received during the marriage. Tradeshift is privately owned; its shares are not publicly traded. A 2012 grant was for 5000 shares of stock; a June 2014 grant was for 7500 shares. As of trial, 4062 shares of the 2012 grant and 2031 of the 2014 grant had vested. Kevin testified that the present value of a share of the options was \$4.57, \$.99 above the 2012 share price of \$3.58, and that there was no value to the 2014 options, as their purchase price and present value were the same.

¶5 A third issue, the enforcement of the PMSA, is intertwined with the first two. The parties agreed that (1) 2014 tax returns would be filed in compliance with state and federal rules and regulations; (2) using the same agreed-upon CPA, both would file their own 2014 tax returns and solely pay any tax liability and receive any income tax refunds set forth in their respective returns; (3) any future income tax credits, refunds, payments or liabilities from or to the IRS or the Wisconsin Department of Revenue based upon the 2013 or prior year joint returns would be divided equally between them; (4) any taxes, costs, and expenses due and payable following the sale of an item of property awarded to either party would be the sole responsibility of the party who was awarded the asset; and (5) each warranted to the other full financial disclosure and each relied on the other's financial representations when entering into the agreement.

¶6 After a bench trial, the court ruled that it would not divide the Lear commission but Kevin would be solely responsible for any portion subject to claw back. As Kevin had not disclosed the ADM commission, the court did not specifically address it but it ordered that any other commission Kevin received for work completed up to the date of the filing of the action was to be split equally.

The court also awarded Kevin all of the stock options, finding them unvested with “nil” current value and only speculative future value.

¶7 Upon learning of the ADM commission, Jodiann moved for reconsideration or, in the alternative, to reopen the judgment. As is relevant here, Jodiann sought half of the net Lear commission proceeds, equal division of the net commissions earned through the date of divorce, and, upon exercise of the stock options, half of the net proceeds. The court denied her motion. Jodiann appeals.

Commissions

¶8 Valuation and division of the marital estate at divorce lie within the sound discretion of the trial court. *Garceau v. Garceau*, 2000 WI App 7, ¶3, 232 Wis. 2d 1, 606 N.W.2d 268. We will uphold the trial court’s valuation and division of property if we determine that the court considered the relevant facts, applied the proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach. *Id.* A court may deviate from the presumed equal division after considering the WIS. STAT. § 767.61(3) (2013-14)³ factors. See *Covelli v. Covelli*, 2006 WI App 121, ¶29, 293 Wis. 2d 707, 718 N.W.2d 260 (construing predecessor statute to § 767.61). This court may search the record for reasons to sustain the trial court’s exercise of discretion. *Hughes v. Hughes*, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998).

¶9 The court heard evidence at trial that the parties lived together less than two months of their six-year marriage, aside from vacations and some weekends. It found that, while they commingled assets to pay joint debts incurred

³ All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

because of the marriage, for the most part “[t]his is a marriage where the parties have done their own thing,” and “[t]here wasn’t any big sacrifice.” It also found that Kevin liquidated his \$75,000 retirement account to benefit the marital estate and that Jodiann was entitled to keep the entire premarital portion and half of the marital portion of her 401k account.

¶10 Kevin testified that the Lear commission had been spent, “a large portion” to pay taxes and \$30,000 to \$40,000 of it to Jodiann. He also testified that the claw-back issue remained unresolved. Jodiann acknowledged receiving part of the commission and solely retaining tax refund monies.

¶11 The ADM contract was closed on March 23, 2014. The amended judgment of divorce made clear that Kevin was to report to Jodiann within ten days of “receipt” of a commission earned by March 16, 2014.⁴ Kevin testified at trial that his financial disclosure statement (FDS) was accurate and up-to-date but conceded he had not checked his account that day. He explained that he had not disclosed the commission because he did not know it had been deposited in his account just days before.

¶12 On reconsideration, the court accepted Kevin’s trial testimony that he shared the Lear commission with Jodiann and that the proceeds were spent “on marital endeavors.” It found that Jodiann was able to keep her salary while also

⁴ The amended judgment orders disclosure within ten days of “receipt” of a commission. The ADM contract was finalized on March 23; Kevin received the commission check on November 28. Perhaps thinking the judgment said “five days,” the court stated that Kevin should have disclosed the commission to Jodiann by March 28. Whether “receipt” means “earned,” by closing a contract, or actually getting the check is not before us. We raise these points only in the context of observing that the ADM contract was closed after the filing of the divorce action.

realizing the benefit of Kevin's greater income, retained \$50,000 in the couple's tax refunds, and was aware that Kevin entered the marriage with a previously made obligation to pay his son's college tuition. It also found that the uncertain timing of the ADM commission and its payout possibly being subject to Lear commission claw back after review by Tradeshift's board and CFO made plausible Kevin's claim that he did not know he had received the ADM commission, and that disclosure would have made no difference since, due to the separate nature of the parties' marriage, it intentionally had tied the division of commissions to the date of filing, rather than the date of divorce. *See Schinner v. Schinner*, 143 Wis. 2d 81, 98, 420 N.W.2d 381 (Ct. App. 1988) (special circumstances may warrant deviation from presumption that all property is marital up to date of divorce). We agree that an unequal division of the commission was permissible.

Stock Options

¶13 A stock option is the ability to buy stock at a future date at a specific value, usually the value on the date the option is granted. *Maritato v. Maritato*, 2004 WI App 138, ¶22, 275 Wis. 2d 252, 685 N.W.2d 379. A stock option contract is not a mere gratuity but an enforceable contract right. *Chen v. Chen*, 142 Wis. 2d 7, 12, 416 N.W.2d 661 (Ct. App. 1987). Whether characterized as vested, unvested, or a future interest, stock options acquired during the marriage, even if not exercisable until after divorce, are a factor to be considered in the property division. *Id.*; *see also* WIS. STAT. § 767.61(3)(j). An option's value is "the difference between the market value and the exercise value, reduced for taxes and any costs associated with exercising the option." *Maritato*, 275 Wis. 2d 252, ¶36 (citation omitted).

¶14 “[T]he valuation of marital assets is a finding of fact.” *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). When more than one value may be assigned to an asset, the appropriate valuation methodology is committed to the trial court’s discretion. *See Sharon v. Sharon*, 178 Wis. 2d 481, 489, 504 N.W.2d 415 (Ct. App. 1993).

¶15 The trial court did not exclude the options from the marital estate. Instead, after acknowledging “some aspect about the value and increase in value” of the options and noting that Kevin would lose them if he left Tradeshift and thus deemed that they all were unvested and their value was “nil,” it concluded it was inappropriate to divide them based on speculation of what their future value might be.

¶16 On motion for reconsideration, Jodiann challenged Kevin’s trial testimony that the stock options were not transferable and the court’s findings that the options were unvested and without value. The court clarified its earlier decision, observing that some of the options were granted to Kevin months after the divorce action was filed, that its earlier findings about the unique and separate nature of the marriage provided the underpinnings for the unequal property division, and that, even though commendably devoted to their children, the parties in this “unusual situation” lived apart in different areas. That is an appropriate consideration. *See Schmitt v. Schmitt*, 2001 WI App 78, ¶18, 242 Wis. 2d 565, 626 N.W.2d 14 (addressing similar provision in maintenance statute, noted that court may consider “separate lives” evidence under broad catch-all provision, *see* WIS. STAT. § 767.61(3)(m), and choose how much weight to give it). The court did not alter its award of the options to Kevin.

¶17 The record reflects that the vested options from the 2012 grant have minimal value and the 2014 options at this point have none and that the options have limitations, such as an expiration date in eight or nine years, a lack of portability if Kevin quits or is terminated, and, even if he stays with Tradeshift, only speculative future value. Even if the court did exclude the virtually valueless stock options from the marital estate, rather than unequally divide them, whether to do so is within its discretion. *Heppner v. Heppner*, 2009 WI App 90, ¶21, 319 Wis. 2d 237, 768 N.W. 2d 261.

¶18 In addition, stock options generally are given to key employees to motivate them to remain as employees and to increase their efficiency and performance. *Maritato*, 275 Wis. 2d 252, ¶22. The Stock Option Agreements confirm Kevin's testimony that the options were granted as an incentive—that is, to encourage better future performance with Tradeshift, not as payment for past accomplishments. The trial court's division of the stock options and decision to award them to Kevin reflects a proper exercise of discretion.

PMSA

¶19 The parties executed the PMSA on the day of trial. Postjudgment, Jodiann brought a motion pursuant to WIS. STAT. § 806.07(1) to vacate portions of it. She claims that she signed the PMSA because she requested, and, we infer, anticipated she would get, half of the net Lear commission but did not realize that if she did not receive half of it she still would be responsible for half of the associated taxes. She further complains that, though her lawyer discussed the PMSA with her the day before trial, she had insufficient time to read through it before trial and the court did not adequately examine her understanding of it. It did not ask her, for example, if she was entering into the agreement freely and

voluntarily, had enough time to talk to her attorney about it, or understood how the PMSA would apply to the disputed issues. We are not persuaded.

¶20 The parties' attorneys informed the court at trial that they had a written stipulation of their clients' agreements and unresolved issues. Jodiann's counsel told the court that he and Jodiann "discussed [the agreement], reviewed it, and understand it outlines what is at issue." When asked if she had any questions, Jodiann simply responded, "Only that some of the issues are not resolved."

¶21 The court found that, while Kevin should have ascertained on the day of trial that his FDS was accurate, divulging the receipt of the ADM proceeds would not have altered its decision to require equal division of only those commissions earned by the date of filing. It found that: both parties testified that it was their agreement; they freely, voluntarily, and knowingly entered into it; each asked the court to incorporate it in the judgment of divorce; there was nothing inappropriate in the way they agreed to divide their tax responsibilities; and the agreement was fair to both and consistent with the trial testimony.

¶22 When a party to a divorce feels that the court should not have approved a stipulation, either because of facts that the court was not aware of or did not properly evaluate, he or she should bring this to the court's attention through, for example, a motion for reconsideration or a motion under WIS. STAT. § 806.07. See *Hottenroth v. Hetsko*, 2006 WI App 249, ¶¶33-34, 298 Wis. 2d 200, 727 N.W.2d 38. Jodiann did. The two postjudgment evidentiary hearings afforded her the opportunity to present whatever evidence and argument that, in her view, rendered erroneous the court's acceptance of the stipulation. Any insufficiency in the information the court had before approving the stipulation thus was cured. See *id.*, ¶45. The court's postjudgment rulings, affirmed here, fully

resolve her claim that the court erroneously exercised its discretion in approving the stipulation.⁵

¶23 Finally, Jodiann asserts in her brief that

the court's exclusion of several assets or portions of assets including the commissions and stock options results in an unequal division of the marital estate.... The resulting property division appears to punish Jodiann, giving Kevin assets at no value but requiring the parties to share the associated tax responsibility without sharing the asset.

¶24 The assets Kevin was awarded at no value are the stock options. The implication is that, if and when Kevin exercises them, Jodiann must shoulder half of the tax burden. Nothing in the PMSA or elsewhere in the record supports that conclusion.

¶25 In all regards, the court's findings are not clearly erroneous. Jodiann did not present either newly discovered evidence or establish a manifest error of law or fact as to the Lear commission so as to warrant granting her motion for reconsideration. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. "A party may not use a motion for reconsideration to introduce new evidence that could have been introduced at [a prior] phase." *Id.*, ¶46. And while Jodiann first learned of the ADM commission after trial, the trial court explained why the nondisclosure ultimately did not matter. Jodiann did not establish a

⁵ Jodiann also complains that Kevin under withheld on his taxes, resulting in her owing additional taxes. As there was testimony at the postjudgment hearing that Jodiann also under withheld, we address this no further.

manifest error of law. The court properly exercised its discretion in denying her motion to reconsider.

¶26 As to her motion to reopen, WIS. STAT. § 806.07(1) permits a court on “such terms as are just” to relieve a party from the terms of a stipulation or judgment. A party may seek relief under § 806.07 from a divorce judgment even if the judgment is based on a stipulation. *Winkler v. Winkler*, 2005 WI App 100, ¶17, 282 Wis. 2d 746, 699 N.W.2d 652. Jodiann invoked para. (a), which permits relief for mistake, inadvertence, surprise or excusable neglect, and para. (h) which permits relief for any other reason justifying relief. *See* § 806.07(1)(a), (h). To promote the balance between finality and fairness, relief under WIS. STAT. § 806.07(1)(h) should be limited to “only the most egregious circumstances.” *Allstate Ins. Co. v. Brunswick Corp.*, 2007 WI App 221, ¶17, 305 Wis. 2d 400, 740 N.W.2d 888.

¶27 Jodiann has not established “mistake, inadvertence, surprise or excusable neglect,” or that her situation could be described as a “most egregious circumstance[.]” As she has not shown that the court erroneously exercised its discretion in denying her motion to reopen, we will not reverse the order denying the requested relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

